Teh Kheng Ping (suing as legitimate son of Lim Ah Sim (deceased)) v Prudential Assurance (M) Bhd

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22NCVC-152–6 OF 2012
SEE MEE CHUN JC
28 JANUARY 2013

Insurance — Duty of disclosure — Material facts — Material non-disclosure — Claim for sum payable under insurance policy — Insurance policy taken by plaintiff's deceased mother — Deceased failed to disclose existence of tumour and passed away after taking up policy — Whether deceased aware of existence of tumour when taking policy — Whether medical examination accurate and correct — Whether insurance company liable to pay benefits

The plaintiff claimed against the defendant, an insurance company for sum payable under an insurance policy ('the policy') taken by his mother ('the deceased'). The deceased was 64 years old when she applied for the policy and as a procedure, due to her age and the amount applied for, the deceased was required to undergo a medical examination. The defendant accepted the proposal but unfortunately, the deceased passed away. The defendant denied any liability to pay and argued that the deceased had not given truthful answers on her medical condition and that the deceased knew all along that she had breast tumour and in that, there was non-disclosure of material facts. A medical examination by one Dr Partheeban ('DW3') revealed that the deceased had a malignant breast tumour. It was testified by the defendant's agent that the deceased approached him to take the policy and then went for a check-up with one Dr Koshy but the former did not inform the latter about the breast tumour. The primary issues that arose before the court was whether the deceased had disclosed material information of her tumour and whether the defendant was liable to pay the benefits under the policy.

Held, dismissing the claim with costs:

(1) The deceased knew all along that she had breast tumour and she was explained by the defendant of her obligation to disclose her medical condition and the non-disclosure of breast tumour was material as this involved a life policy. If this information and that of the advice to see a specialist had been disclosed at the proposal stage, the defendant would have declined the policy (see paras 11–13).

(2) The defendant had proved the answers given by the deceased in her statement to Dr Koshy were inaccurate and incorrect. The proposal form

of the declaration stated that the information given in the proposal form and any information given to the medical examiner was true, full and complete and no important information had been withheld. It followed that any untrue and incomplete statement would be a ground for the defendant to avoid the contract of assurance (see paras 18–19).

(3) The defendant only had to prove material non-disclosure and not fraudulent misrepresentation. Section 147(4) of the Insurance Act 1996 required fraudulent misrepresentation if the policy sought to be invalidated was after the expiry of two years from the date on which it was effected. Here, the policy sought to be invalidated was within the two years period from when it was effected (see para 21).

[Bahasa Malaysia summary

Plaintif menuntut terhadap defendan, syarikat insurans untuk jumlah berbayar di bawah polisi insurans ('polisi') yang diambil oleh ibunya ('si mati'). Si mati adalah berumur 64 tahun apabila dia memohon untuk polisi tersebut dan sebagai prosedur, oleh kerana umurnya dan jumlah yang dipohon, si mati dikehendaki menjalani pemeriksaan perubatan. Defendan menerima cadangan tersebut tetapi malangnya si mati telah meninggal dunia. Defendan menafikan apa-apa liabiliti untuk membayar dan berhujah bahawa si mati tidak memberi jawapan-jawapan yang betul atas keadaan kesihatannya dan bahawa si mati sememangnya mengetahui yang dia mempunyai kanser payudara dan dengan itu, terdapat fakta material yang tidak didedahkan. Pemeriksaan perubatan oleh seorang yang bernama Dr Partheeban ('DW3') menunjukkan bahawa si mati mempunyai kanser malignan payudara. Ia disahkan oleh ejen defendan bahawa si mati mendekatinya untuk mengambil polisi dan kemudiannya membuat pemeriksaan dengan seorang yang bernama Dr Koshy tetapi si mati tidak memberitahu Dr Koshy mengenai kanser payudara tersebut. Isu utama yang berbangkit di hadapan mahkamah adalah sama ada si mati mendeddahkan maklumat material mengenai kansernya dan sama ada defendan bertanggungjawab untuk membayar faedah di bawah polisi tersebut.

Diputuskan, menolak tuntutan dengan kos:

(1) Si mati sememangnya mengetahui yang dia mempunyai kanser payudara dan dia diberi penjelasan oleh defendan mengenai tanggungjawabnya untuk mendedahkan keadaan kesihatannya dan ketidakdedahan kanser payudara adalah material kerana ini melibatkan polisi nyawa. Jika maklumat ini dan nasihat untuk berjumpa dengan pakar didedahkan pada peringkat cadangan, defendan akan menolak polisi tersebut (lihat perenggan 11–13).

(2) Defendan telah membuktikan jawapan-jawapan yang diberikan oleh si mati dalam pernyataannya kepada Dr Koshy adalah tidak tepat dan

betul. Borang cadangan perisytiharan menyatakan bahawa maklumat yang diberikan dalam borang cadangan dan apa-apa maklumat yang diberikan kepada pemeriksa perubatan adalah benar, penuh dan lengkap dan tiada maklumat disembunyikan. Oleh itu apa-apa pernyataan yang tidak benar dan tidak lengkap akan menjadi alasan untuk defendan untuk mengelak kontrak jaminan (lihat perenggan 18–19).

(3) Defendan hanya perlu membuktikan ketidakdedahan material dan bukan salah nyata. Seksyen 147(4) Akta Insurans 1996 memerlukan salah nyata jika polisi yang dipohon untuk tidak disahkan selepas tamat dua tahun dari tarikh ia dikuatkuasakan. Di sini, polisi yang dipohon untuk tidak disahkan adalah dalam masa tempoh dua tahun dari masa ia dikuatkuasakan (lihat perenggan 21).]

Notes

For cases on material facts, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 106–108.

Cases referred to

Aetna Universal Insurance Sdn Bhd v Fanny Foo May Wan [2001] 1 MLJ 227; [2001] 1 CLJ 476, HC (refd)

Alliedbank (Malaysia) Bhd v Yau Jiok Hua [1998] 6 MLJ 1, HC (refd)

Chong Khee Sang v Pang Ah Chee [1984] 1 MLJ 377 (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)

Legislation referred to

Insurance Act 1996 ss 147(4), 150(1)

SP Raman (S Raman & Co) for the plaintiff.
K Navinderan (Shearn Delamore & Co) for the defendant.

See Mee Chun JC:

[1] This is a claim by the plaintiff against the defendant for RM400,000 being the sum payable under a Prulink one plan policy taken out by Lim Ah Sim ('the deceased'). By proposal form dated 9 February 2011 a sum of RM200,000 was applied for. The deceased was then 64 years old. Due to her age and amount applied for the deceased was required to go through a medical examination which was duly done on 21 February 2011. The proposal was accepted by the defendant on 1 March 2011. The defendant's agent ('DW2, Ong Sze Ean') then suggested to the deceased to top up as she would be unable to do so at 66 years. This resulted in supplementary proposal form dated 11 April 2011 to top up by another RM200,000. The supplementary proposal

was also accepted by the defendant. The policy is in B1–119. The deceased passed away on 23 June 2011 and the cause of death given in the death certificate (B122) is 'old age'. The deceased and the plaintiff are mother and son and the benefits of the policy had been absolutely assigned to the plaintiff.

[2] The defendant denies liability to pay stating non disclosure of material information relating to a breast tumour by the deceased. The defendant relies on the proposal form which contains the note requiring the deceased to fully and faithfully disclose all facts which she knows or ought to know ('B73') and the signed declaration in B90 the information given in the proposal is true and nothing material has been withheld. It was further stated the deceased had not given truthful answers on her medical condition in the proposal form as in B79–82 nor in the statement to the medical examiner at B129–133.

THE PRIMARY ISSUE

[3] The primary issue is whether the deceased had not disclosed material information thereby rendering the defendant not liable to pay out the policy benefit.

WHETHER MATERIAL INFORMATION HAD NOT BEEN DISCLOSED

[4] The evidence of the plaintiff and PW2 (the daughter with whom the deceased was staying with) is that their mother was in good health at the time of purchase of policy. Whenever she was not well PW2 would be the one bringing her to the clinic. It is further their evidence that after the purchase of the policy the deceased was brought to Pantai Hospital Sungai Petani twice. The first was on 22 March 2011 when the deceased was feeling giddy and vomited but the doctor said there was nothing wrong. The second occasion was on 6 April 2011 when the deceased fell in the toilet of PW2's shop, hit something resulting in bleeding. She was admitted to hospital and they were then told their mother had a tumour. Prior to this they were not aware.

[5] The defendant's case is that as at 17 September 2010 the deceased knew of her tumour. On that day she had had gone to see Dr Partheeban ('DW3'). It is DW3's evidence the deceased was brought in by immediate family members who were the husband, PW2 and the plaintiff for blood tests. He did a medical examination and the deceased complained of swelling. There was some herbal medication on her left breast. DW3 advised the plaintiff and PW2 in the presence of the deceased to do a biopsy and see a specialist. The blood test result as in D1–3 was received on 21 September 2011. The husband and PW2 came to collect. DW3 advised them the results showed a malignant breast tumour and for the deceased to see a specialist. The deceased came again on

A 9 November 2011 for a dressing. In cross-examination to a question whether the deceased was aware of her breast condition he replied 'she must be aware of something'. No tissue or histopathology test was done. As to whether a biopsy and tissue test would better confirm breast tumour he replied 'to a certain extent'. He did not give any treatment for the breast tumour. He was sure who B had accompanied the deceased to his clinic. The plaintiff is also his patient. He didn't give any referral letter. To a question that he didn't personally tell the deceased she had breast tumour he replied 'Yes because not sure'. In re-examination he said he could not be sure if there was growth except if there had been a histopathology and if there was any abnormality on the breast it can C be seen visually. When he examined her he saw the breast mass and told the family members. No tissue test was done as he didn't have the facility. His advice for them to see a specialist is good medical practice.

D **[6]** DW3 prepared the medical questionnaire in C12–15. In para 2 is stated the patient ie the deceased complaint of left breast swelling and the diagnosis of left breast mass and the advice to see a specialist for biopsy and diagnosis. The results of blood investigation done on 17 September 2010 was recorded in para 3.

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[7] The plaintiff denied he had accompanied the deceased to see DW3. PW2 said she had brought the deceased to DW3 on 17 September 2010 as her mother wanted a medical check-up for 36 diseases. No one else went along. DW3 suggested a blood test and didn't examine the deceased. On 9 November F 2011 they went back a second time and DW3 showed them the results. DW3 told them everything was all right, didn't say the deceased had cancer, tumour or swelling. In cross-examination PW2 said she didn't know why the deceased wanted the check up and that she was not told it was for insurance. Before this she had not brought the deceased for any 36 diseases check. She knew of DW3 G as she brings her children there. She denied she brought the deceased to DW3 when she complained of swelling or that DW3 had told them of the breast tumour.

H **[8]** DW2 testified he has been an insurance agent with the defendant for nine years. The deceased is a customer and had applied for a policy in 2003. In 2011 the deceased had approached him to take a policy. He met her at the shop and explained the benefits and terms and conditions. He did a quotation. She was not keen then as she wanted to get the budget. Six days later there was a second I meeting where he explained again the terms and conditions. This time she agreed to buy and he then filled up the proposal form in front of the deceased. He explained that 'whether healthy or not she must declare to me'. On the health particulars in B73–85 he asked the questions in Hokkien, the deceased answered and he filled in.

[9] After DW2 submitted the proposal form the defendant then asked for a medical and DW2 brought the deceased to Dr Koshy of Klinik Marten on 21 February 2011. Dr Koshy asked on her medical condition and medical history. A clinical examination and an ECG was done. The medical examination form as in B129–133 was filled up and given to DW2. DW2 did not know that the deceased had seen DW3 on 17 September 2010. The deceased did not inform him of her breast tumour. In cross-examination DW2 was specifically asked how he explained B78(2), 80(4.3g), 81(4.6c) to the deceased to which he said it was explained in Hokkien and the deceased understood. He did not explain the declaration in B85. He was satisfied the deceased had given truthful answers. As to whether he noticed her health condition when he was explaining to her he said she looked well and healthy. On B129 Dr Koshy filled up when he ('DW2') was in the room. The doctor asked the deceased the questions. Question 4 was asked in Malay and Hokkien. The deceased could speak well in Malay as she runs a sundry shop. The deceased signed at B131 in front of Dr Koshy. DW2 knew the deceased was telling the truth to Dr Koshy. Dr Koshy personally examined her. The defendant refused to pay as the deceased hadn't told the truth. His opinion was the deceased told the truth as she passed the medical examination. In re-examination as to the deceased health he said he wouldn't know if the deceased was having breast pain. On him being satisfied with the deceased answers he wouldn't know if she chooses not to disclose information on her medical condition.

[10] From the evidence it is clear the deceased had gone to see DW3 at his clinic on 17 September 2010. What is disputed is what transpired at the clinic. As between the evidence of the plaintiff, PW2 and that of DW3 I prefer that of DW3. This is because the fact of his diagnosis of breast tumour is supported by the blood test results in D1–3 as reflected in his medical questionnaire in C12–15 (para 3) which showed a raised level of 'CA' indicating the presence of tumour cells. DW3 had advised the family members in the deceased presence for a biopsy to be done and for her to see a specialist. That he did not give a referral letter is not material to the fact of his diagnosis and as further explained by him advice to see a specialist is good medical practice. On him not telling the deceased personally because he was unsure does not detract from what he told the family members about the need for a biopsy. There is also his evidence the deceased must know that something is wrong with her.

[11] Thus the deceased knew as at 17 September 2010 the day of her visit to DW3 that she had a breast tumour. Accordingly the deceased had failed to give truthful answers by answering 'No' to the questions in the proposal form as below:

> B 78 Question 1. Have you ever had or been told you had or been treated for … cancer or tumour …?

B 78 Question 2. Have you ever had or been advised to undergo any diagnostic tests, investigations or operations, or referred to any specialists of hospital?

B 80 Question 4.3. Have you ever had or been told you had or been investigated or received or currently receiving treatment or advice for-

(g) Cancer … tumour, growth …

B 81 Question 4.6c. Have you ever had any disease or disorder of the breast, … including breast lump …

Deceased had further failed to answer questions fully and truthfully in the statement to the medical examiner, Dr. Koshy, as below —

B 129 In the column on personal doctor she had answered she had no particular doctor and none for 'date of last consultation' and none for 'reasons for consultation'.

B 129 Question 2. Have you ever had or been told you had or been treated for —

(h) Cancer, tumour, cyst or any growth?

B 130 Question 4. In the past 5 years have you had any —

(a) diagnostic tests such as … blood or other urine tests?

(b) … medical advice … or physical check up not mentioned above?

[12] The evidence also shows DW2 had explained to the deceased her obligation to disclose her medical condition. Section 150(1) of the Insurance Act 1996 states as follows:

Duty of disclosure

150(1) Before a contract of insurance is entered into, a proposer shall disclose to the licensed insurer a matter that —

(a) he knows to be relevant to the decision of the licensed insurer whether to accept the risk or not and the rates and terms to be applied; or

(b) a reasonable person in the circumstances could be expected to know to be relevant.

[13] DW1 (the defendant's senior claims manager) had explained the non disclosure of breast tumour was material as this involved a life policy. If this information and that of the advice to see a specialist had been disclosed at the proposal stage they would have declined the policy.

THE MEDICAL EXAMINATION ON 21 FEBRUARY 2011

[14] If the deceased had a breast tumour from as early at 17 September 2010 and she knew it, the question arises as to how she could have passed the medical

examination carried out by Dr Koshy on 21 February 2011. In this regard the issue is whether the medical questionnaire prepared by Dr Koshy in C16–18 who was not called as a witness can be considered. This document was placed in *ikatan dokumen yang dipersetujui tetapi tertakluk kepada soal balas*. At the beginning of the trial the plaintiff's counsel informed the court all documents were agreed documents. It was submitted by the plaintiff's counsel that this however still meant the maker had to be called to prove the contents as the contents were not admitted 'automatically'.

[15] Three cases were referred to. In *Alliedbank (Malaysia) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1 it was stated at p 14 'where a document is sought to be proved in order to establish the truth of the facts contained in it, the maker has to be called. … Non compliance with this rule will result in the contents of the documente being hearsay. …'. In *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509 under held '[2] The words in the letter '… tendered through its maker …' appeared to run counter to the subsequent words 'dispensing with formal proof'. Consequently the police report although included in part II of the agreed bundle could not be put in evidence without calling its maker. And since the first respondent was not called as a witness the police report could not be taken into account at in deriving any conclusion'. The third case was *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377 which held 'once a document is included in an agreed bundle, it is no longer necessary to prove the existence or execution. Nor is it necessary to produce the original. But so far as the contents of the documents are concerned, the truth of the same has to be proved, in the absence of any specific admission of the facts contained therein'.

[16] The principles enunciated in the above cases are that the truth of agreed documents are considered as admitted where parties (in this case the plaintiff) has not objected to it. At pp 714–715 (MLJ); p 531 (CLJ) of *Jaafar bin Shaari & Anor* the following propositions were taken as well settled:

> (1) Whether the contents of a document that has been included in an agreed bundle may be used by either party to prove or disprove a fact in issue depends entirely upon the terms of the agreement between the solicitors having conduct of an action. If by their agreement they dispense with formal proof and also agree to the truth of the contents of a particular document, then its contents may be relied upon either side to establish or to disprove a fact in issue. On the other hand, if the agreement is only to forgo proof of the making of the document, then, the contents may not be so used. …
>
> (2) Where a document is included in an agreed bundle without any qualification, then no question as to its formal proof arises and its contents may be relied upon to establish a fact in issue. …

[17] Applying the above propositions to our instant case all documents which were agreed subject to cross-examination (Part B) as in C and D were made agreed documents without any qualification by the plaintiff's counsel. Hence C16–18 is an agreed document in terms of authenticity and contents. It is further not necessary for the defendant to call Dr Koshy as a witness because what is being offered through C16–18 is the clarification on the clinical examination done. The essence of the answers to questions 2–4 was that no breast examination was done and as to whether he noticed any lesion/abnormality on the breast his answer was 'breast examination not done'. The answers given were his (Dr Koshy) nurse prepared the deceased, ECG was done by him. No signs of pain while in preparation and when ECG being performed, no lesion/abnormality on the breast was noticed, no tumour noted, no information offered in relation to the breast tumour and seemed normal. There were some questions directed towards DW3 on the ECG. DW3 had given evidence the blouse and undergarment has to be removed for an ECG and in doing an ECG a tumour or growth can be noticed and a nurse is not qualified to detect a breast tumour. In relation to the answer of Dr Koshy that no breast examination had been done and the question if a patient was wearing a bra whether it would be possible to see a lesion or breast mass DW3 said it would not be possible. The sum total of the medical questionnaire is that no breast examination was done and the nurse having prepared the deceased for ECG was not qualified to have detected the tumour. the plaintiff had not questioned the fact the nurse had prepared the deceased for the ECG or that the nurse could not have detected the breast tumour. It is therefore probable the deceased had breast tumour then. Even if the contents in C16–18 are held to be disputed the facts of the nurse preparing the deceased for the ECG and her competence to detect the tumour remained intact.

[18] The statement to the medical examiner Dr Koshy in B129–131 was signed by the deceased at p 131. In the proposal form Part 7 of the declaration (B84) states the information given in the proposal form and any information given to the medical examiner is true, full and complete and no important information has been withheld. It is further stated 'this information will form the basis of the contract of assurance between me and you'. It follows any untrue and incomplete statement would be a ground for the defendant to avoid the contract of assurance. In *Aetna Universal Insurance Sdn Bhd v Fanny Foo May Wan* [2001] 1 MLJ 227; [2001] 1 CLJ 476 it was held at p 232 (MLJ); p 481 (CLJ):

> … the statement to the medical examiner forms part of the proposal form and was subject to the basis clause stated therein. The express terms quoted above, both in the statement to the medical examiner and the proposal form itself stated that both the documents form part and parcel of the same application.
>
> … Reference was expressly made in the proposal form to the effect that the answers in any medical examination form part of the proposal. The legal effect of a basis clause in a proposal form is that it entitles the insurer to avoid the contract simply by showing that the statement was inaccurate or incorrect ….

[19] In this instant case the defendant has proved the answers given by the deceased in her statement to Dr Koshy were inaccurate and incorrect. Arising from these answers an inaccurate assessment was carried out in that no breast examination was done.

THE DATE OF SUPPLEMENTARY PROPOSAL FORM

[20] On the date of the supplementary proposal form it was DW2 evidence it was submitted three times on 11 and 20 March 2011 and 11 April 2011. The first two times it was declined as the system was down. The third time it was accepted and the defendant asked the supplementary proposal form be dated 11 April 2011. There is no reason not to accept DW2 evidence that although the supplementary proposal form was dated 11 April 2011 it was submitted on 11 March 2011. This has however no bearing on the outcome of the case due to the earlier finding that the deceased knew as at 17 September 2010 she had a breast tumour.

THE FRAUDULENT MISREPRESENTATION NOT REQUIRED

[21] The defendant only has to prove material non disclosure and not fraudulent misrepresentation. Section 147(4) of the Insurance Act 1996 requires fraudulent misrepresentation if the policy sought to be invalidated is after the expiry of two years from the date on which it was effected. Here the policy sought to be invalidated is within the two years period from when it was effected.

A THE CONCLUSION

[22] For the above reasons the plaintiff's claim is dismissed with costs.

B *Claim dismissed with costs.*

Reported by Afiq Mohamad Noor

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